IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRIMINAL APPEAL NO.1726 SB OF 2003

DATE OF DECISION: NOVEMBER 02, 2007

Sukhdev Singh

.....Appellant

VERSUS

State of Haryana

....Respondent

CORAM:- HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgement?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

PRESENT: Mr. Sanjeev Manrai, Advocate,
for the appellant.

Mr. Yashwinder Singh, AAG, Haryana,
for the State.

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RANJIT SINGH, J.

Recovery of 21 bags of poppy husk, each weighing 40 Kgs. from a house is attributed to the appellant, which has led to his trial, conviction and sentence of 10 years RI coupled with fine of Rs.one lac for having committed an offence under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as “the Act”). Aggrieved against his conviction and award of sentence, the appellant has filed the present appeal.

On 29.11.1999, a police party consisting of SI Ujjagar Singh of CIA Staff (PW8) and SI Jaipal Singh (PW9) and other constables were on a patrolling duty, when PW8 and PW9 received a secret information to the effect that appellant Sukhdev Singh son of Hajura Singh, resident of Palsar was

indulging in sale of poppy husk and was having sufficient quantity lying in his house and that if the house was raided, a large quantity of poppy husk could be recovered. The police party, as afore-mentioned, reached house of one Raghbir Singh Bhoria, Tehsildar, Ratia. SI Ujjagar Singh (PW8) disclosed the secret information received as afore-mentioned and asked him to join the raiding party. He agreed and went with the police party. The raiding party accordingly reached Village Palsar and met Gurjant Singh, Sarpanch of the village. Secret information was then shared with him and he was taken along for conducting raid. The raiding party reached the house of the appellant, who was found present there. Upon a search of the house, 21 bags of poppy husk were found lying in a room near the eastern wall. On weighment, each bag was found weighing 40 Kgs. 100 grams sample was taken from every bag and the residue quantity sealed with the seal `RS'. The contraband recovered was taken into possession vide recovery memo Ex.PE. The seal after use was given to Tehsildar Raghbir Singh Bhoria. Ruqa, Ex.PC, was sent to Police Station, leading to registration of a formal FIR, Ex.PC/1. The case property was produced before SI Hardev Singh (PW4) and report was also forwarded to DSP. SI Hardev Singh put his seal `HS' on the case property and directed that it be deposited in MHC. The appellant was taken in custody. The samples were sent to FSL and report revealed that it was poppy husk. Thus the prosecution, trial and conviction of the appellant.

The case of the prosecution is supported by the evidence of as many as 9 witnesses. The accused when confronted with incriminating facts and circumstances, pleaded false implication. He

pleaded not guilty to the charge under Section 15 of the Act preferred against him. Having appreciated the evidence led by the prosecution and the plea of the appellant raised, the trial Court found the appellant guilty and sentenced him as already noticed.

Learned counsel appearing for the appellant has raised number of pleas in support of his stand and has prayed for allowing the appeal and setting-aside of the conviction of the appellant. He would first contend that the case would reflect violation of Section 42 of the Act as the secret information, which led to raiding the alleged residential premises of the appellant was never reduced into writing. The information in this regard was also not sent to superior officer, as required under the said Section. The counsel would further contend that prosecution failed to prove the recovery of contraband from the conscious possession of the appellant. In this regard, he would mainly submit that there is no evidence on record that the house from which this contraband was recovered belonged to the appellant. The contention is that even if the appellant was arrested from the house, it would not mean that the contraband was in his conscious possession, unless it was established that the house was owned or possessed by him exclusively. He would also urge that presence of Gazetted Officer is highly doubtful besides raising the plea that no independent witness has appeared to support the recovery. As per the counsel, the link evidence is totally missing in this case.

On the other hand, the learned State counsel would say that the raiding party consisted of a Tehsildar, who can be termed as an independent witness. This coupled with the fact that the appellant was arrested from the house from where the contraband was

recovered would clearly show that he was in the conscious possession of the same. Accordingly, the State counsel would say that giving up of Sarpanch, who was joined as an independent witness having been won over would not effect the prosecution, especially so when Tehsildar has vouchsafed the recovery as well as the remaining aspect of the prosecution case.

I have given my thoughtful consideration to the rival contentions raised before me. Concededly, the recovery is pursuant to the secret information received by the police, who was on routine checking duty. The secret information received was about the contraband, which was statedly lying in a house. The provisions of Section 42 of the Act, thus, were clearly attracted. There is not much dispute between the parties that this secret information was not reduced into writing, as per requirement under Section 42 of the Act and the copy thereof was also not sent within 72 hours to the immediate superior official. Counsel for the appellant would seek support from the Supreme Court judgment in the case of ***Beckodan Abdul Rahiman Vs. State of Kerala,*** 2002 (2) R.C.R. (Criminal) 385. Section 42 of the Act regulates the power of entry, search, seizure and arrest of a person without warrant or authorisation. However, in case any officer authorised under this Section intends to search, seize or arrest a person etc. without a warrant or authorisation, then he is required to follow the requirements mentioned in the Section, one of which is that if he has reason to believe from personal knowledge or information given by any person, then to take down the same in writing. The Section also has a proviso contained in it, which reads as under:-

> "Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sun set and sun rise after recording the grounds of his belief."

As per Section 42(2) of the Act, where an officer takes down any information in writing under sub-section (1) or record grounds of his belief under the proviso thereto, he shall forthwith sent copy thereof to his immediate superior official. The counsel have made some submissions in regard to the nature of Section 42 being mandatory or otherwise.

The Hon'ble Supreme Court has considered this aspect in the case of **Beckodan Abdul Rahiman** (supra). While relying upon the cases of ***State of Punjab Vs. Balbir Singh,*** 1994 (3) SCC 299 and ***Saiyad Mohd. Saiyad Umar Saiyad & Ors. Vs. State of Gujarat,*** 1995 (3) SCC 610, the Hon'ble Supreme Court took a view that if there is a total non-compliance of the provisions, then the same effects the prosecution case. It is further observed that to that extent, it is mandatory. In fact, the Hon'ble Supreme Court has emphasized the requirement of these stringent provisions under the Act having regard to the wide sweep and grave consequences that flow on the proof and on conviction of an accused under the Act. It is in this background, as observed by the Hon'ble Supreme Court, the legislature has enacted and provided certain additional safeguards in the form of various provisions of the Act, which

includes Section 42 besides Section 50 of the Act. The Constitutional Bench of the Supreme Court in the case of Balbir Singh (supra) had made a detailed observation in this regard by saying that harsh provisions of the Act would cast a duty on the prosecution to strictly follow the procedure and compliance of the safeguards. It is a known principle of jurisprudence that procedural safeguards contemplated in an Act are required to be considered in the context of and corresponding to the severity of the consequences that may visit by exercise of that jurisdiction. As held in ***Ranjit Thakur Vs. Union of India and others,*** AIR 1987 Supreme Court 2386, the procedural safeguards should be commensurate with the sweep of the powers. It is further observed that the wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the statute. This principle appears to have been noticed in Balbir Singh's case (supra), when the Hon'ble Supreme Court observed that severer the punishment, greater the care to be taken to see that all the safeguards provided in the statute are scrupulously followed. As observed by the Hon'ble Supreme Court, the legitimacy of the judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during the search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. The aspect of violation of the provisions of Section 42 of the Act was also gone into by the trial Court but glossed over by referring to the case of ***Gurdev Kaur Vs. State of Haryana,*** 2002 (1) RCR (Criminal) 257. This was so done even after

noticing that defence had in this regard relied upon the judgment of Supreme Court in ***State of Punjab Vs. Baldev Singh,*** (1999) 6 Supreme Court Cases 172 and ***Gurjant Singh Vs. State of Haryana,*** 2000 (2) RCR (Criminal) 47 and ***Om Parkash Vs. Haryana State,*** 1999 (1) RCR (Criminal) 771. In Gurdev Kaur's case (supra), the non-compliance of Section 42 was ignored on the ground that persons were statedly present at the Bus Stand and insisting on compliance of Section 42 in that situation may have led to the accused persons getting opportunity to escape. That situation does not arise in the present case. In fact, Section 42 of the Act appears to apply in those cases where property liable for seizure or freezing or forfeiture is kept or concealed in any building, conveyance or enclosed building. In that sense, the rigors of Section 42 were not strictly attracted in the case of Gurdev Kaur (supra). Violation of Section 42 of the Act, even if it be not wholly mandatory, can not easily be ignored. Non-compliance of this provision certainly can be seen as one which may or would cause prejudice to any accused even if it may not end in vitiating the trial. Case law in this regard has been discussed in detail by the Hon'ble Supreme Court in ***Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat,*** JT 2000 (1) SC 471. The submission made before the Hon'ble Supreme Court in this case was that non-compliance of Section 42 of the Act can not be vested with greater consequence than what has been held by the Constitutional Bench of the Supreme Court regarding non-compliance of the conditions in Section 50 of the Act. In this regard, in Balbir Singh's case (supra), it is held as under:-

““(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reasons to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3)Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.”

The Hon'ble Supreme Court in Abdul Rashid Ibrahim Mansuri's case (Supra), in regard to non-compliance of Section 42 of

the Act has held :-

> "When the same decision considered the impact of non-compliance of Section 50 it was held that "it would affect the prosecution case and vitiate the trial". But the Constitution Bench has settled the legal position concerning that aspect in **State of Punjab v. Balbir Singh** (supra), the relevant portion of which has been extracted by us earlier. We do not think that a different approach is warranted regarding non-compliance of Section 42 also. If that be so, the position must be the following:
>
> If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised on the strength of such unrecorded information would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused."

In ***State of West Bengal and others Vs. Babu Chakraborty,*** AIR 2004 Supreme Court 4324, the Hon'ble Supreme

Court again has gone into the aspect of violation of the provisions of Section 42 of the Act and came to conclude as under:-

> " Great significance has been attached to the mandatory nature of the provisions, keeping in mind the stringent punishment prescribed in the Act. This Court has attached great importance to the recording of the information and the ground of belief since that would be the earliest version that will be available to a Court of law and the accused while defending his prosecution. This Court also held that failure to comply with S.42(1), proviso to S.42(1) and S.42(2) would render the entire prosecution case suspect and cause prejudice to the accused."

In this case reliance has also been placed on the cases of Abdul Rashid Ibrahim Mansuri and Beckodan Abdul Rahiman (supra). The Constitutional Bench of the Hon'ble Supreme Court in the case of Baldev Singh (supra) observed as under:-

> "Having considered the evidence we find it difficult to set aside the order of acquittal recorded by the Additional Sessions Judge. Though the offence involved is of a considerable magnitude of 70 bags containing 34 Kgs of poppy husk, each without any permit/licence, this Court is constrained to confirm the acquittal for the reasons that the mandatory requirements of Section 50 of Narcotic Drugs and Psychotropic Substances Act, 1985 has not been complied with. Protection given by Section 50 is a valuable right to the offender and compliance thereof

intended to be mandatory. In case the police officers had prior knowledge that illegal transport of the contraband is in movement and persons are in unlawful possession and intends to intercept it, conduct search and consequentially to seize the contraband, they are required to inform the offender that he has the right that the search will be conducted in the presence of a gazetted officer or a Magistrate. Thereafter on their agreeing to be searched by the police officers, the search and seizure of the contraband from their unlawful possession would become legal and valid. However, the evidence collected in breach of mandatory requirement does not become inadmissible. It is settled law that evidence collected during investigation in violation of the statutory provisions does not become inadmissible and the trial on the basis thereof does not get vitiated. Each case is to be considered on its own backdrop."

As already noticed, there is not much dispute that the provisions of Section 42 of the Act and its proviso were not complied with. The evidence on record would show that raid in this case was conducted between sun set and sun rise. The provisions of Section 42(1) requires that where an officer has reason to believe that a search warrant or authorization can not be obtained without affording an opportunity for the concealment of evidence or facility for escape of an offender, he may enter and search such building, conveyance or enclosed place at any time before sun set and sun rise after recording the grounds of his belief. As already noticed,

great significance is attached to the nature of these provisions keeping in mind the stringent punishment prescribed under the Act. Violation of the provisions of the Section, as held in number of judgments noted above, would render the entire case of prosecution suspect and would cause prejudice to the accused. The resultant effect of non-compliance of these provisions, as such, can not be denied to the appellant.

Even if this aspect is kept aside for the sake of arguments, another serious infirmity in the prosecution case regarding the proof of the house being in the ownership or possession of the appellant would stare at the prosecution. It is strenuously argued by learned counsel for the petitioner that the prosecution did not lead any evidence to show that this house, from where the recovery was effected, was in the ownership of the appellant or was in his possession. When Ujjagar Singh (PW8) deposed before the Court about the secret information and the fact that huge quantity of poppy husk could be recovered from the house of the appellant, the same was objected to. PW-8 otherwise did not give any evidence to the effect that the house from where the recovery was made belonged to the appellant. No doubt, this recovery was effected from a house and from a room where it was found lying on the eastern side but the appellant was not arrested from the same room. Rather, the appellant was found lying in a room having no doors and which opened towards the courtyard of the house. The evidence would also show that there were 8 to 9 rooms in the house. Other family members were also found present in the other rooms but nobody was found present in the room from where

the appellant was found. The bags were lying in yet another room. When the raiding police party had gone to the house from where the recovery was effected, the appellant was found sleeping in a room and his identity was disclosed by the Sarpanch, who was accompanying the raiding party. PW9, in contrast to the version given by PW8, did not see any family member of the appellant present in the house. His version shows that 5 rooms were searched before entering the room from where the recovery was effected. No member was found present in the room when the search was taken. A specific question was addressed to PW9 to the effect if he collected any evidence regarding the proof that the house was owned by the appellant and his answer in this regard was "**no documentary proof was collected regarding the ownership of the house**." PW9 further stated that "**ration card was also not seen by us to get the confirmation of the possession of the house or ownership of the house**." PW9 could not state as to how many children the appellant had. He, however, denied the suggestion of the evidence that nothing was recovered in the presence of appellant and his signatures were obtained on the papers at Police Station.

In his defence, the appellant has specifically stated:-

> "I am innocent. Nothing was recovered from my possession. I was falsely implicated in this case due to party faction in the village. **I have no concern with the house.** I was falsely challaned by the police."

The evidence of so called eye witness, Tehsil Raghbir Singh (PW6), in my view, would be of not much avail to the

prosecution. Though he had identified the appellant before a Court as the same person who was present in the house from where the recovery was effected but he has not given any evidence to prove that this house belonged to the appellant. Rather, identification of the appellant by PW6 is also on the basis of Sarpanch, namely, Gurjant Singh, who has not been examined. In fact, Sarpanch Gurjant Singh has identified the appellant before the police party and Tehsildar. Another aspect, which may require notice is that the police appears to have an ample time to contact PW6 and take him along at the time of raid but did not think or consider it proper to reduce the secret information into writing, especially so when the raid was being conducted between sun set and sun rise and further that they failed to comply with the requirement of sending this information to senior official, as required under Section 42 of the Act. This would make the prosecution case look suspect, and would cast doubt on the evidence of police witnesses. The Tehsildar, though not a police official, but is the one who had been taken by the police and can not be entirely termed as an independent witness. This is besides the fact that defence has raised doubt about the presence of PW6 at the time of raid. It is urged that he had signed only one document and then returned to his house. The reason for which he was made to join the raiding party, is also not forth-coming. It is not disputed by the prosecution that by the time the documentation was completed, the sun has risen. It is also on record that this contraband was removed from the scene through a tractor trolley but still no efforts were made to join any independent witness at the time of raid and recovery. It is in evidence that the house from where the recovery was effected is

surrounded by other residential houses. This evidence came through PW9. Still, he did not make any effort to join any independent witness at the time of raid or recovery.

Analysing the evidence in totality, it can be noticed that though the prosecution evidence would show that the recovery of the contraband was effected from the house but it is nowhere established that this house belonged to the appellant. In that sense, it is not proved beyond reasonable doubt that if this contraband was recovered from the conscious possession of the appellant. The raiding party was consisting of two senior police officers holding the rank of Sub Inspector. They have still not investigated the case properly. They can be expected to know that in order to fasten the appellant with contraband and its recovery, it was essential for them to prove and show that the house was that of the appellant and further that it was in his exclusive possession. Even if it be taken for the sake of argument that this recovery was from a house from where the appellant was also arrest, it would still not be enough to say that the contraband was recovered from his conscious possession. This could have only been achieved by proving that the house belonged to the appellant and was in his possession and so too the contraband. There is, as such, some justification in the submission made by counsel for the appellant that prosecution did not succeed in showing the contraband to be in conscious possession of the appellant. Considering the totality of the evidence, I am of the considered view that the prosecution did not succeed in proving the case against the appellant beyond reasonable doubt. Violation of the provisions of Section 42 of the Act would make the

case of police look suspect. The independent witness, which could have lend credence to the story, was given up having been won over. It will, thus, be unsafe to convict the appellant for an offence, which carries such serious consequences.

The appeal is accordingly allowed. The conviction and sentence awarded to the appellant is set-aside. The bail bonds and surety bonds, if any furnished in the trial Court, shall stand discharged.

November 02,2007 **(RANJIT SINGH)**
khurmi **JUDGE**